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IN THE

# Supreme Court of the United States

**October Term, 1952**

No. 318

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NATIONAL LABOR RELATIONS BOARD,

*Petitioner,*

v.

ROCKAWAY NEWS SUPPLY CO., INC.

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

## BRIEF OF NEWSPAPER AND MAIL DELIVERERS' UNION OF NEW YORK AND VICINITY, AS *AMICUS CURIAE* ON BEHALF OF THE PETITIONER

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## BRIEF OF NEWSPAPER AND MAIL DELIVERERS' UNION OF NEW YORK AND VICINITY, AS *AMICUS CURIAE* ON BEHALF OF THE PETITIONER

The Solicitor General, on behalf of the National Labor Relations Board, prayed that a writ of certiorari issue to review the judgment of the Court of Appeals for the Second Circuit entered on May 12, 1952 (R. A. 15-21, 23),[1] denying enforcement of an order issued by the Board against Rockaway News Supply Co., Inc. This Court granted certiorari to review on October 27th, 1952.

[1] For purposes of this brief, the printed record before this Court consists of two separately paginated volumes: the appendix to respondent's brief in the court below, herein designated "R. A.," and the appendix to the Board's brief in the court below, designated "B. A." The proceedings in the court below are bound with, and paginated continuously from, the end of the appendix to respondent's brief

## Opinions Below

The majority and dissenting opinions of the Court of Appeals (R. A. 15-21, 21-22) are reported at 197 F. 2d 111. The findings of fact, conclusions of law, and order of the National Labor Relations Board (B. A. 7-36) are reported at 95 NLRB 336.

## Jurisdiction

The judgment of the Court of Appeals was entered on May 12, 1952 (R. A. 23). The jurisdiction of this Court is invoked under 28 U. S. C. 1254, and Section 10 (e) of the National Labor Relations Act, as amended.

## Question Presented

Whether an employer violates Section 8 (a) (1) and (3) of the National Labor Relations Act by discharging an employee for refusing, during the course of his employment, to cross a lawful picket line of a labor organization of which he is not a member at the premises of an employer other than his own.

## Statute Involved

The pertinent provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U. S. C., Supp. V, 151, *et seq.*) are set forth in Appendix, *infra*, pp. 27-31.

## Statement

### 1. The Facts

The facts, as found in the findings of fact, conclusions of law, and order of the Board dated July 20, 1951, (B. A. 7-36), are not in dispute. Rockaway News Supply Co., Inc. had in its employ one Charles Waugh whom it had used

as a steady chauffeur and routeman for about seven years preceding March 7, 1950. Waugh was a member of the Newspaper and Mail Deliverers' Union of New York and Vicinity, the exclusive bargaining representative for delivery department employees of Rockaway (B. A. 19; 40, 49, 56-60). For five scheduled days of the week, from 9:45 A. M. to 6:30 P. M., Waugh's assignment was to drive a truck along a fixed route picking up and delivering newspapers and other periodicals (B. A. 20; 42-43). On every working weekday Waugh would stop at the plant of the Daily Review Corporation, Rockville Centre, Long Island, New York, to pick up bundles of the Nassau Daily Review Star and deliver them further along his route. The pickup operation consumed ten minutes of the working day and was performed in the morning (B. A. 20; 42, 43, 47, 49). Before beginning work on Thursday, March 2, 1950, Waugh was advised that the Nassau County Typographical Union had established a picket line around the premises of the Daily Review Corporation (B. A. 20-44). On reporting for work that morning Waugh spoke to his foreman and informed him that he "as a Union man, would not cross that Union picket line and thereby become a scab or a strike-breaker" (B. A. 20; 45). The foreman, while stating that Waugh's decision might cost Waugh his job, acquiesced to Waugh's suggestion and arranged to have the Daily Review's newspapers brought to Rockaway's plant so that Waugh could pick them up there rather than at the struck plant (B. A. 20-21; 35, 46).

Substantially the same arrangement was followed on Friday, March 3rd, 1950 (B. A. 21; 46-47). However, on Tuesday, March 7th, Waugh's next work day, the foreman told Waugh that this time he would have to cross the picket

line in front of the Daily Review Corporation's plant or else suffer discharge (B. A. 21; 47-48). Waugh reiterated his refusal to cross the picket line and left his employer's premises (B. A. 21; 48).

Waugh reported for work the following day but was informed that he had been fired. Every day thereafter, for about three weeks, Waugh turned up at Rockaway's plant to request work but each such application was denied by his employer (B. A. 21; 48-49). Waugh's discharge was made the subject of a grievance before an arbitration panel, under the terms of the collective bargaining agreement between Rockaway and Newspaper and Mail Deliverers' Union of New York and Vicinity (R. A. 12-13), and the arbitration panel ruled that Waugh had been justifiably discharged for refusal to obey the foreman's orders as required by the contract (R. A. 10-11, B. A. 25-26).

### 2. The Action of the Board

The Board in its conclusions and order held that Waugh's refusal to cross the picket line was an exercise of a right guaranteed by Section 7 of the Act and that the employer's discharge of Waugh therefore violated Section 8 (a) (1) and (3) of the Act (B. A. 8-10, 28-30).

The Board also found that the picket line thrown up by the Typographical Union outside the plant of the Daily Review Corporation was legitimate and that Waugh's activity, in refusing to cross the line, was in concert with the Typographers, notwithstanding the fact that Waugh was not a member of that Union (B. A. 9-10). Further, the Board concluded that Waugh's refusal to cross the picket line was not motivated by any desire or wish to be insubordinate or unilaterally "to impose or alter his own condi-

tions of employment while remaining at work" but rather an exercise of his statutory right to engage in a form of concerted activity dictated by a deeply ingrained principle of the labor movement (B. A. 8-9). Although the Board found that Waugh's summary discharge was an unfair labor practice, it charted a course for the employer by saying "Respondent, as a normal incident of its right to maintain its operations, could have required Waugh to elect whether to perform all his duties or, as a striker, to vacate his job and make way for his replacement by the Respondent" (B. A. 9).

The Board countered respondent's argument that Waugh's conduct had constituted a breach of the collective bargaining agreement between the employer and Waugh's Union, and was so adjudicated by the arbitration panel acting under that contract, by citing its former order[2] outlawing the identical contract in its entirety because it contained an unlawful union-security clause (B. A. 8, 30-32).

The Board thereupon entered its cease and desist order directing the reinstatement of Waugh with back pay (B. A. 10-14).

### 3. The Decision of the Court Below

The Court below, in setting aside the order of the Board, first summarized the facts of the case, then stated that "this case squarely presents the question whether it is an unfair labor practice for an employer to discharge an employee who refuses to obey the employer's orders to perform that part of his regular daily duties which involve his crossing the picket line of another union than his own at

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[2] *Rockaway News Supply Company, Inc.*, 94 NLRB 1056 (1951).

another plant than that of his employer." The majority agreed that Waugh's act of refusal to cross the picket line was an exercise of "'the right to * * * assist labor organizations * * * and to engage in other concerted activities for the purpose of * * * mutual aid or protection,' which is expressly guaranteed by Section 7 of the Act."

The majority recognized that the refusal to cross a picket line, so habitual with union members, was an act of assistance to the labor organization conducting the picketing and was directed to mutual aid or protection (R. A. 17).

Nevertheless, the Court held that although the act of refusing to cross a picket line was a right guaranteed by Section 7 of the Act, it was not an unlimited right, but one to be reconciled with the right of employers by reasonable rules to govern the conduct of employees during working time. Since there was binding authority that an employer could promulgate rules, enforceable by discharge, prohibiting union solicitation on company premises during working time, it followed, reasoned the Court, that the right to refuse to cross another union's picket line at another plant being "* * * of no higher dignity or importance to the individual than the right to ask his fellow workers in his own plant to join with him in the union of which he is a member * * *" should be subject to the same limitations. Hence, the right to refuse to cross the picket line of another union at another plant was protected by the Act only when the refusal occurred on the employee's own time. Where the refusal occurred, as here, during the employee's working hours, the employee could be discharged by his employer with impunity, for otherwise the employee could unilaterally dictate the terms of his employment (R. A. 18).

The court below described the decision of the Board, to the effect that the employer instead of summarily discharging the employee, could have required the employer either to perform all of his duties or vacate his job as a striker leaving himself open to replacement, as unrealistic. For, said the court, if Waugh had gone on strike and had his union supported him, such a strike would have become a secondary strike outlawed by Section 8 (b) (4) of the Labor Management Relations Act of 1947 and, while Waugh's individual action was not a violation of the Act, it was still a violation of his individual obligation to his employer, and consequently a proper basis for his discharge. Further, such an individual unassisted strike could not conceivably be won.

Finally, the Court noted that the chief object of Waugh's concern seemed to be with his own standing as a union man rather than that of helping the Typographical Union.

*National Labor Relations Board* v. *Illinois Bell Telephone Co.*, 189 F. 2d 124 (7th Cir. 1951) certiorari denied, 342 U. S. 885 was cited as authoritative support for the instant decision upon allegedly substantially similar facts.

Judge Clark dissented, observing that the proviso contained in Section 8 (b) (4), with respect to picket lines was not to be encroached upon by implication and that the analogy of the limitation of union solicitation on working time should not have been applied to restrict "this explicit and unlimited exception of the 1947 Act to *only non-working hours.*" This, the dissenting Judge noted, was a practical nullification of the proviso (R. A. 22). He was also of the opinion that the question of breach of a collective bargaining agreement had been properly removed from the

case and that the Board's decision as to the applicability of the rules governing the rights of economic strikers and their employers was well grounded in authority.

## Specification of Errors to Be Urged

The Court below erred:

(1) In holding that an employer does not violate Section 8 (a) (1) and (3) of the National Labor Relations Act by discharging an employee for refusing, during the course of his employment, to cross a lawful picket line of a labor organization of which he is not a member at the premises of an employer other than his own.

(2) In holding that an employee is protected by Sections 7 and 8 (a) (1) of the Act for refusing to cross a lawful picket line of a labor organization of which he is not a member at the premises of an employer other than his own only when such refusal occurs during the employees' non-working hours.

## Summary of Argument

The Court below was unanimous in holding that the act of an employee in refusing to cross the lawful picket line of another union at another plant was the exercise of a right to engage in concerted activities to assist labor organizations for the purpose of mutual aid or protection expressly guaranteed by Section 7 of the Act. However, the authority[3] chiefly relied upon by the majority of the

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[3] *National Labor Relations Board* v. *Illinois Bell Telephone Co.*, 189 F. 2d 124 (7th Cir.), certiorari denied, 342 U. S. 885.

Court below laid great stress upon the premise that such a refusal was factually not activity protected by Section 7 of the Act. Manifestly when an employee respects the picket line of another union he is aiding and assisting the picketing employees and their union. Ultimately, the solidarity which he has shown with the pickets will rebound to his benefit when and if he is in need of the solidarity and protection afforded by others in the labor movement.

The Act, in its definitions, takes care to extend the scope of interested parties who are to receive its benefits beyond the limits of those standing in strict employer-employee relationships. Factually there is a demonstrable unity of interest amongst employees generally and any activity which descriptively falls within the purview of Section 7 of the Act is guaranteed the protection of that Section and by the invocation of Section 8 (a) (1), except as it may be limited elsewhere in the Act.

There was a valid labor dispute here involving conditions of employment at the plant of the Daily Review Corporation. By refusing to cross a picket line, Waugh made himself a party to the dispute in acting in concert with the pickets against their employer. His own interest was a direct one, since he, in the course of his own employment, was distributing the product of the struck employer. His act of refusal was therefore one in concert with the striking employees for their mutual aid and protection.

Prior to the enactment of the Labor Management Relations Act of 1947, Section 7 of the National Labor Relations Act of 1935 was given broad meaning. Union activities were protected including practices now restrained by Section 8 (b) of the 1947 Act. It follows that Congress, in

enacting Section 8 (b), intended to proscribe activities heretofore protected. But from that group of former rights that had once been protected, the one activity that was expressly preserved, was the right of an employee to refuse to cross the picket line of another employer at a plant other than his own. Consequently, we have the strongest legislative affirmation that the activity which Waugh engaged in was protected within the meaning of Section 7 and enforceable under Section 8 (a) (1) of the amended Act.

The court below, while recognizing that Waugh's activity was one guaranteed protection by Section 7, nevertheless confined the exercise of the right to non-working hours on a demonstrably inapplicable analogy. While concededly employers have enforceable rights to the management of their own businesses, conflicting rights are not to be reconciled by extinguishing one of them. The analogy relied upon by the majority opinion below, and extended as a rule to this instance, is not apposite for the simple reason that their subject matter is quite different.

Section 8 (b) (4) makes it a union unfair labor practice to "encourage the employees of another employer to engage in * * * a concerted refusal in the course of their employment to * * * handle or work on any goods * * *" where the object of the refusal is one of those prescribed by that sub-section. It is in exactly that part of the statute proscribing refusals "in the course of their employment" that the saving proviso is set forth protecting the right of employees to refuse to cross a picket line established at a plant of an employer other than their own.

Therefore, the majority below were doubly in error in that:

(1) Although the right to respect an outside picket line was palpably not similar to a right to union organizational activity on company time, the Court insisted upon treating them as similar, so that a rule applicable to one was extended to the other, limiting its exercise to non-working hours. It is submitted that while the organizational right is left substantially unimpaired and protected, the right to respect a picket line is virtually destroyed.

(2) It extended the rule directly contrary to the terms of the statute which explicitly contemplated and protected action in the "course of * * * employment."

The Board, while holding Waugh's discharge to be an unfair labor practice, apparently felt it necessary to chart a course of action for the employer, viz., to tender Waugh an election between performing all of his duties or going out on strike subject to replacement. This promulgation of a rigid procedure governing the actions of both employer and employee in future instances was unnecessary for the decision of the case. It was enough for the Board to affirm that an employer in similar situations can lawfully endeavor to have the refused work done. It was not proper to assume that in every instance an employee would be obliged either to cross the picket line or go on strike and subject himself to replacement.

## ARGUMENT

### I

**The refusal of an employee to cross the lawful picket line of another union at the plant of an employer other than his own is concerted activity of assistance to labor organizations for purposes of mutual aid or protection within the meaning of Section 7 of the Act.**

The Court below was in unanimous agreement on this point. However, the decision of the Court of Appeals for the Eighth Circuit in *National Labor Relations Board* v. *Illinois Bell Telephone Co.*, 189 F. 2d 124 (7th Cir., 1951), certiorari denied, 342 U. S. 885, while distinguishable[4] in several important respects, is in conflict with the decision in the instant case. There it was held that the refusal of eight employees to cross the picket line of another union to get to their own place of employment was neither activity in concert nor for mutual aid or protection and therefore not protected activity within the meaning of Section 7 of the National Labor Relations Act of 1935.

The decision in the *Illinois Bell* case was relied upon by the respondent and was cited by the majority as authoritative for its own decision.

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[4] The picketing organization neither claimed nor had jurisdiction over the picketed plant whose employees were represented by another union of which the eight employees were members. The court laid great stress on the proposition that the employees were acting in derogation of the authority and standing of their own exclusive collecive bargaining representative which was not on strike. The case was also decided under the National Labor Relations Act of 1935, but had the Labor Management Relations Act applied, the saving proviso of Section 8(b)(4) with regard to picket lines could not have been applicable since the plant being picketed was the plant of their own employer.

The conflict goes to the very meaning of Section 7. If "concerted activities" are to become a term of art meaning only activities in conjunction with one's fellow employees; if "assisting labor organizations" is to mean only assisting one's own union; and if "mutual aid or protection" is to become a test to be satisfied only by a showing of immediate tangible benefit to be received by the participant, then the protection guaranteed in the Act has been so limited as to cover only immediate employee-employer relationships. We think that in this important aspect, the decision in the *Illinois Bell* case is in error and at variance with the express provisions of the amended Act, the determinations of the Board and the holdings of the courts.

The amended Act does not lend itself to such narrow construction. Section 2 (3) expressly provides that the term "employee" is not to be limited to the employees of a particular employer. Taken in conjunction with Section 2 (9) wherein "labor disputes" are defined so that the disputants need not stand in the direct relation of employer-employee, it becomes apparent that any attempt to encapsulate the protective coverage of the Act to activities wherein the only participants are those standing in direct employer-employee relationships does violence to the plain direction of the Act.[5]

The affirmative portion of Section 7 of the Act is identical with Section 7 of the National Labor Relations Act of 1935 (Wagner Act) which in turn took the provision from Section 7 of the National Industrial Recovery Act. The

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[5] Even without the statute, other guarantees define and protect a broader interest. See, for example, *American Federation of Labor* v. *Swing*, 312 U. S. 321.

activities described therein were neither created, nor evoked by the section; they were merely made matters of right and given legal protection against employer interference. Unions and their memberships did not wait for the statutory protection to engage in concerted activities for mutual aid or protection, among them the traditional activity of respecting a picket line; the history of American labor is replete with such action prior to 1935. The fact that refusal to cross a picket line was a time honored form of concerted activity when Section 7 was first formulated hardly argues that it was intended to be excluded from coverage by an enactment which declared that employees were to have the right to "assist labor organizations" and engage in "concerted activities" for "mutual aid or protection."

The Board, vested as it is, with the task of applying the Act to the myriad facts and events making up the labor scene, has consistently held that persons honoring picket lines are engaged in protected activities within the meaning of Section 7 and that coercive employer measures in these instances are unfair labor practices[6]

The narrow doctrine enunciated in the *Illinois Bell* case, *supra*, runs contrary to the case law preceding it. The true quality of "mutual aid or protection" was ably pointed out by the Court of Appeals, 2nd Cir., per Hand, C. J. in *National Labor Relations Board* v. *Peter Cailler Kohler*

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[6] See *Montag Brothers, Inc.*, 51 N. L. R. B. 366 (1943); *Illinois Bell Telephone Co.*, 88 N. L. R. B. 1171 (1950); *New York Telephone Co.*, 89 N. L. R. B. 383 (1950); *Cinch Manufacturing Co.*, 91 N. L. R. B. 371 (1950); *West Coast Casket Co.*, 97 N. L. R. B. No. 108 (1951).

*Swiss Chocolates Co., Inc.*, 130 F. 2d 503 (2nd Cir., 1942) at pp. 505, 6:

> "* * * When all the other workmen in a shop make common cause with a fellow worker over his separate grievance, and go out on strike in his support, they engage in a 'concerted activity' for 'mutual aid and protection' although the aggrieved workman is the only one of them who has any immediate stake in the outcome. The rest know that by their action each one of them assures himself, in case his turn ever comes, of the support of the one whom they are all then helping; and the solidarity so established is 'mutual aid' in the most literal sense, as nobody doubts. So too of those engaging in a 'sympathetic strike' or secondary boycott; the immediate quarrel does not itself concern them, but by extending the number of those who will make the enemy of one the enemy of all, the power of each is vastly increased. It is one thing how far a community should allow such power to grow; but whatever may be the proper place to check it, each separate extension is certainly a step in 'mutual aid and protection'."[7]

In the amended Act, Congress restrained certain labor activity through the enactment of Section 8(b) which re-

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[7] See also *Fort Wayne Corrugated Paper Company* v. *National Labor Relations Board*, 111 F. 2d 869 (7th Cir., 1940) per Evans, C. J., at page 874, "The Wagner Act will not be construed to have so narrow a scope as to protect union activities only in the interrelation between the employees and employer of one company. Unionism on a national scope is too well a recognized fact to confine legal protection solely to intracompany relations. Unions would gain little bargaining ability if they were protected solely in company units"; and *National Labor Relations Board* v. *Phoenix Mutual Life Insurance Company*, 167 F. 2d 983 (7th Cir., 1948).

moved protection from the totality of "concerted activities" for "mutual aid or protection" hitherto guaranteed by Section 7. In Section 8(b)(4) those activities whose purpose fell within any of the four proscribed classifications were made subject to restraint by the Board. But Congress was careful to save from proscription "a refusal by any person to enter upon the premises of any employer (other than his own employer), if the employees of such employer are engaged in a strike ratified or approved by a representative of such employees whom such employer is required to recognize under this Act;". Here, if anything, is irrefutable statutory affirmation of the protection contained in Section 7 for the particular form of concerted activity which is the subject of the instant case.

Other courts have not hesitated to find refusal to cross picket lines a protected activity within the meaning of Section 7. *National Labor Relations Board* v. *Montag Brothers, Inc.*, 140 F. 2d 730 (5th Cir., 1944); *J. A. Bentley Lumber Co.* v. *National Labor Relations Board*, 180 F. 2d 641 (5th Cir., 1950).

## II

**It was error for the court below to withdraw the protection of the Act from Waugh's conceded right to respect the picket line because he had exercised it in the course of his employment.**

Once the court below arrived at the conclusion that Waugh's refusal to cross the outside picket line was an activity "expressly guaranteed by Section 7 of the Act"

(R. A. 17), it was bound to make good the guarantee and vindicate the exercise of the right. Yet the court concluded that the right, so expressly guaranteed, was illusory, because it had been exercised during working hours and Waugh had thus left himself open to summary discharge by his employer.

The majority below achieved this anomalous result by finding an analogy applicable to facts and phenomena not at all analogous to Waugh's situation, and by applying the rule so derived even though it extinguished Waugh's right. Because, reasoned the majority below, the right to engage in union organizational activity had been limited to non-working hours in deference to management's prerogative,[8] the right to respect another union's picket line at another employer's plant should be similarly limited. What the majority below did not see was that while such a limitation leaves the exercise of the right to organize virtually unimpaired, since organizational activities can be effective at most times, and frequently are conducted outside of working hours, it completely stultifies the right to refuse to cross a picket line which can only be effectively exercised during the working hours of the employee exercising the right.[9]

The *Republic Aviation* case, *supra*, had affirmed the policy of the Board in reconciling rights which in certain

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[8] See *Republic Aviation Corp.* v. *National Labor Relations Board*, 324 U. S. 793; *Peyton Packing Company*, 49 N. L. R. B. 828 (1945).

[9] "'Protecting' the right to refuse to cross a picket line only in non-working hours is, in effect, to accord no protection at all." Article, Immunity from Discharge for Refusal to Cross a Picket Line, Columbia Law Review, Vol. 52, No. 7, pp. 934-936 at p. 936 (November, 1952).

contexts might be conflicting.[10] The particular Board policy there affirmed was the rule that the right to participate in union organizational activity on company premises, in deference to management's prerogative of directing employer conduct during working time, could be limited, if the company so directed, to off-duty time.[11] The general principle thus enunciated by this Court was a rule of reason aimed at striking balances between rights in areas of conflict so as to allow the fullest possible exercise of these rights as circumstances could equitably permit. In the par-

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[10] 324 U. S. 793 at pp. 797, 8, the Court saying, per Reed, J.:

> "These cases bring here for review the action of the National Labor Relations Board in working out an adjustment between the undisputed right of self-organization assured to employees under the Wagner Act and the equally undisputed right of employers to maintain discipline in their establishments. Like so many others, these rights are not unlimited in the sense that they can be exercised without regard to any duty which the existence of rights in others may place upon employer or employee. Opportunity to organize and proper discipline are both essential elements in a balanced society.
>
> "The Wagner Act did not undertake the impossible task of specifying in precise and unmistakable language each incident which would constitute an unfair labor practice. On the contrary that Act left to the Board the work of applying the Act's general prohibitory language in the light of the infinite combinations of events which might be charged as violative of its terms. Thus a 'rigid scheme of remedies' is avoided and administrative flexibility within appropriate statutory limitations obtained to accomplish the dominant purpose of the legislation. *Phelps Dodge Corp.* v. *Labor Board*, 313 U. S. 177, 194. * * *".

[11] By the same token, employers generally cannot prohibit such activity on company premises during employees' off-duty time. *National Labor Relations Board* v. *Illinois Tool Works*, 153 F. 2d 811 (7th Cir., 1946); *Carter Carburetor Corp.* v. *National Labor Relations Board*, 140 F. 2d 714 (8th Cir., 1944).

ticular context dealt with by the *Republic Aviation* case, both management's and labor's rights were preserved and left unimpaired by the disposition of this Court.

Quite different was the disposition of the majority below which, in purporting to make the *Republic Aviation* case the determinant of its decision, violated its general principle by applying the specific rule to dissimilar facts. Patently the refusal of an employee to cross another union's picket line at another employer's plant is not the same as organizational activity amongst employees at work in a plant. Here, by limiting the right of refusal to non-working hours, the very right was destroyed which admittedly had been guaranteed by Section 7. Conversely what should have been a right of endeavor on the employer's part in such a situation was expanded into an unqualified right of command.

In determining rights, as in the instant case, the court was bound under the doctrine of the *Republic Aviation* case to find a balance between them, not to destroy the employee's statutory right in favor of the employer's right to run his business as he sees fit.

The analogy drawn by the court below was not only inapposite because of the difference in the facts to which it was applied, but the Act itself precluded it. For while the *Republic Aviation* case and the Board policy which it affirmed, governed a balancing of rights where the Act was silent, such is not the case here. The proviso, in Section 8 (b) (4) of the Act, which saves the right of an employee to refuse to cross outside picket lines, sets it apart from a group of otherwise proscribed activities where employees are induced "* * * to engage in * * * a concerted refusal

rather than to employees in another labor organization or in another trade, craft, or class, unless such employer is failing to conform to an order or certification of the Board determining the bargaining representative for employees performing such work: *Provided,* That nothing contained in this subsection (b) shall be construed to make unlawful a refusal by any person to enter upon the premises of any employer (other than his own employer), if the employees of such employer are engaged in a strike ratified or approved by a representative of such employees whom such employer is required to recognize under this Act;

* * *

PREVENTION OF UNFAIR LABOR PRACTICES

SEC. 10. (a) The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce. This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise * * *.

* * *

(c) * * * If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this Act * * *

* * *

(e) The Board shall have power to petition any circuit court of appeals of the United States (including the United States Court of Appeals for the District of Columbia), or if all the circuit courts of appeals to which application may be made are in vacation, any district court of the United States (including the District Court of the United States for the District of Columbia), within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall certify and file in the court a transcript of the entire record in the proceedings, including the pleadings and testimony upon which such order was entered and the findings and order of the Board. Upon such filing, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter upon the pleadings, testimony, and proceedings set forth in such transcript a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. * * *

in the course of their employment to * * * handle or work on any goods * * *." In that context there is no longer room for analogy and the Act expressly protects the rights of employees who refuse to enter picketed premises "in the course of their employment".

The proviso itself carries its own striking evidence of the intention of the Congress to protect such refusals during working hours. The act which the proviso protects is the "refusal" of a person to enter upon picketed premises. The connotation of "refusal" is a negative response to a direction, request or command and, in the statutory context, can only mean a refusal to his own employer's request at any time inclusive of working hours. Nor does the statutory concern that such refusal not be deemed unlawful make much sense if all that it seeks to do is protect from sanction the act of an employee in his off duty capacity of private citizen in not entering upon picketed premises when in any event he is not subject to employer discipline.

The court below endeavored to show that had Waugh been given the opportunity to go out on strike, his effort would have been foredoomed to failure since the assistance of his own union would have been illegal under the provisions of Section 8 (b) (4) (A) of the Act. The court is implying that concerted activity by Waugh's fellow employees to obtain Waugh's reinstatement would be an illegal secondary boycott. Strikes and other concerted activities to force reinstatement of discharged, laid off, or replaced employees are entirely legal, being denominated economic or unfair labor practice strikes according to the

circumstances attending their inception.[12] To attempt to outlaw activities having *bona fide* legal purpose, because the incidental effect might be a cessation of the employer's ability to carry on his business including that with a picketed customer would go a long way toward nullifying the rights accorded by theAct.[13] The court below seemed intent not only to justify Waugh's summary discharge for engaging in protected activity, but to give the employer continuing guarantees against concerted activities that could have been taken in Waugh's behalf.

The Board felt obliged to prescribe a course of conduct to be followed after an employee has exercised his right to refuse to cross an outside picket line in the course of his employment,

> "Respondent, as a normal incident of its right to maintain its operations, could have required Waugh to elect whether to perform all his duties or, as a striker, to vacate his job and make way for his replacement by the Respondent" (B. A. 9).

One can appreciate the reasons of the Board for charting such a course in the light of case law which it mistak-

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[12] *National Labor Relations Board* v. *Globe Wireless, Ltd.*, 193 F. 2d 748 (9th Cir., 1951); *Carter Carburetor Corp.* v. *National Labor Relations Board*, 140 F. 2d 714 (8th Cir., 1944); *National Labor Relations Board* v. *Greensboro Coca-Cola Co.*, 180 F. 2d 840 (4th Cir., 1950); *National Labor Relations Board* v. *Remington Rand, Inc.*, 130 F. 2d 919 (2nd Cir., 1941); *Douds* v. *Local 1250, Retail Wholesale Dept. Store Union of America, C. I. O.*, 173 F. 2d 764 (2nd Cir., 1949).

[13] Cf. *National Labor Relations Board* v. *International Rice Milling Co., Inc.*, 341 U. S. 665; *National Labor Relations Board* v. *Service Trade Chauffeurs, Salesmen & Helpers, Local 145*, 191 F. 2d 65 (2nd Cir., 1951).

enly deem applicable.[14] The cases which declare that workers cannot unilaterally dictate the conditions of their employment, but must either go out on strike for their demands or accept employer directions are but variants of *National Labor Relations Board* v. *Fansteel Corp.*, 306 U. S. 240, and *National Labor Relations Board* v. *Sands Manufacturing Co.*, 306 U. S. 332. In each instance, the employee conduct, *i.e.*, refusal to accept either alternative, placed the offending employees in the position of having committed a wrong similar to trespass or breach of contract for which they could be summarily discharged.[15] Here Waugh had exercised a right which was given him by the Act under circumstances clearly contemplated by the Act. While the employer had a clear right to take whatever lawful measures were available to it in an endeavor to get the refused work done, it could do no more than was necessary in the circumstances for that purpose. Otherwise the object would not be to get its job done but rather to trample on the right which Section 7 had given and guaranteed to Waugh. Conceivably many situations might arise where an employer, from the standpoint of his interest, would have no alternative but to require the refusing employee "as a striker, to

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[14] *National Labor Relations Board* v. *Montgomery, Ward & Co., Inc.*, 157 F. 2d 486 (8th Cir., 1946); *National Labor Relations Board* v. *Kopman-Woracek Shoe Manufacturing Company*, 158 F. 2d 103 (8th Cir., 1946); *C. G. Conn. Ltd.* v. *National Labor Relations Board*, 108 F. 2d 390 (7th Cir., 1939).

[15] Cf. *National Labor Relations Board* v. *Kennametal, Inc.*, 182 F. 2d 817 (3rd Cir., 1950) where employer reprisal after termination of single stoppage to present demands was invalidated, with *International Union, U. A. W., A. F. L.* v. *Wisconsin Employment Relations Board*, 336 U. S. 245.

vacate his job and make way for his replacement.'"[16] Nothing in the instant situation required a discharge of Waugh to accomplish any legitimate employer objective. For two days the employer had found means of distributing the Review Star (B. A. 45-47); after Waugh's discharge other members of Waugh's union made the pickup (B. A. 21; 55-56). Certainly Waugh's position was no block to the employer; at most a transfer of routes could have satisfied any legitimate employer interest. Despite the disclaimer, the case seems a clear instance of the discrimination mentioned in footnote 4 of the majority opinion below,

> "'[4] We do not have here a case in which the order to cross the picket line was a discriminatory order enforced against a union employee in order to prejudice him by reason of his union membership. Such a situation would, of course, involve other considerations.'"

Instead of giving employers a universal right to require employees in Waugh's position to become full fledged economic strikers, the Board would have been better advised to advise employers of their right to take only such measures as the specific circumstances required to accomplish their legitimate objective.

While the collective bargaining agreement between Waugh's union and his employer and the arbitration that

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[16] Without prejudice to his rights of reinstatement at the termination of the strike. *National Labor Relations Board* v. *Mackay Radio & Telegraph Company*, 304 U. S. 333; *The M. H. Ritzwoller Company* v. *National Labor Relations Board*, 114 F. 2d 432 (7th Cir., 1940); *National Labor Relations Board* v. *Globe Wireless, Ltd.*, *supra* note 12.

was had thereunder seem to have been taken out of consideration in this case because of the prior action of the Board in voiding the contract in its entirety,[17] it is doubtful whether it could have governed the outcome of this case in any event. That contract did not bargain away Waugh's statutory right to refuse to cross an outside picket line. If it had, it would have been, as the arbitration was, an attempt to derogate from the rights vested in the Board. As Jackson, J., stated for the Court in *J. I. Case Company* v. *National Labor Relations Board*, 321 U. S. 332 at p. 337 with respect to private contracts,

> "* * * 'The Board asserts a public right vested in it as a public body, charged in the public interest with the duty of preventing unfair labor practices.' *National Licorice Co.* v. *National Labor Relations Board*, 309 U. S. 350, 364. Wherever private contracts conflict with its functions, they obviously must yield or the Act would be reduced to a futility."

An attempt, by arbitration, to deprive a person of rights prescribed by law or derogate from public bodies charged with enforcement could not be enforced under the local law.

*Western Union Tel. Co.* v. *American Communications Ass'n, C. I. O.*, 299 N. Y. 177;

*Kingswood Management Corp.* v. *Salzman*, 272 App. Div. 328 (N. Y. 1947);

*Publishers' Ass'n of New York City* v. *Newspaper & Mail Deliverers Union of New York and Vicinity*, 280 App. Div. 500 (N. Y. 1952).

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[17] *Rockaway News Supply Company, Inc.*, 94 N. L. R. B. 1056 (1951).

## CONCLUSION

**The judgment of the court below should be reversed and the order of the Board enforced.**

Respectfully submitted,

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December, 1952.

## APPENDIX

The applicable sections of the National Labor Relations Act, as amended (61 Stat. 136, 29 U. S. C. Supp. V, 151 *et seq.*), are as follows:

2(3) The term "employee" shall include any employee, and shall not be limited to the employees of a particular employer, unless this subchapter explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment, but shall not include any individual employed as an agricultural laborer, or in the domestic service of any family or person at his home, or any individual employed by his parent or spouse, or any individual having the status of an independent contractor, or any individual employed as a supervisor, or any individual employed by an employer subject to chapter 8 of Title 45 and section 225 of Title 28, or by any other person who is not an employer as herein defined.

2(9) The term "labor dispute" includes any controversy concerning terms, tenure or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment, regardless of whether the disputants stand in the proximate relation of employer and employee.

### Rights of Employees

Sec. 7. Employees shall have the right to self-organization, to form, join, or assist labor organiza-

tions, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8 (a) (3).

UNFAIR LABOR PRACTICES

Sec. 8 (a) It shall be an unfair labor practice for an employer—

(1) To interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

* * *

(3) By discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: * * *

* * *

(b) It shall be an unfair labor practice for a labor organization or its agents—

(1) To restrain or coerce (A) employees in the exercise of the rights guaranteed in section 7: *Provided*, That this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein; or (B) an employer in the selection of his representatives for the purposes of collective bargaining or the adjustment of grievances;

(2) To cause or attempt to cause an employer to discriminate against an employee in violation of

subsection (a) (3) or to discriminate against an employee with respect to whom membership in such organization has been denied or terminated on some ground other than his failure to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

(3) To refuse to bargain collectively with an employer, provided it is the representative of his employees subject to the provisions of section 9 (a);

(4) To engage in, or to induce or encourage the employees of any employer to engage in, a strike or a concerted refusal in the course of their employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services, where an object thereof is: (A) forcing or requiring any employer or self-employed person to join any labor or employer organization or any employer or other person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person; (B) forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees unless such labor organization has been certified as the representative of such employees under the provisions of section 9; (C) forcing or requiring any employer to recognize or bargain with a particular labor organization as the representative of his employees if another labor organization has been certified as the representative of such employees under the provisions of section 9; (D) forcing or requiring any employer to assign particular work to employees in a particular labor organization or in a particular trade, craft, or class

agement, in keeping with the provisions of the statute. Not only is it a far better and more equitable solution than that of the Court below, but it appears to strike the best possible balance between competing forces. Such a fair and reasonable formula should not be upset unless it is plainly contrary to legislative intent.

The Board, in its holding, ruled that Waugh's refusal to cross another union's picket line was a protected activity for mutual aid or protection under Section 7 of the Act. To this extent, the Court below agreed. But Waugh's employer, not concerned in the labor dispute between third parties that produced the picket line, also had the right to keep his business going. Accordingly, the Board ruled that the employer could compel Waugh to cross the picket line or, in accordance with his protected rights under Section 7, vacate his job as a striker. Waugh's strike would ostensibly be against his own employer in an effort to gain the concession of not being forced to violate trade union principles that would ultimately provide him with the protection and advantages that labor organizations bring to American workmen.

As the Court below noted, the employer would then have the right to replace Waugh as an economic striker. That, of course, is the risk that any American workman runs if he elects to lay down his tools and go on strike. The Court below added the assertion that "it was inconceivable that Waugh could have won his strike." This assertion, at best a gratuitous one, at once denies Waugh the right even to try and also does not take into account other factors which might enable Waugh eventually to win his strike.

The consequences flowing from the Board ruling would allow Waugh to return to his employer after a few days of his strike, if he had not been replaced, yield to his employer's demand, resume his duties and cross the picket line. On the other hand, the employer might not be able to replace Waugh if he was operating in an area of labor scarcity or